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IN THE
Supreme Court of the United States

DONALD P. ROPER,
SUPERINTENDENT, POTOSI CORRECTIONAL CENTER,
Petitioner,

v.

CHRISTOPHER SIMMONS,
Respondent.

On Writ Of Certiorari To The Supreme Court of Missouri

BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL BAR ASSOCIATION, THE NATIONAL URBAN LEAGUE INSTITUTE FOR OPPORTUNITY AND EQUALITY, THE NATIONAL BLACK POLICE ASSOCIATION, THE NATIONAL CONFERENCE OF BLACK LAWYERS, AND THE NATIONAL BLACK LAW STUDENTS ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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Interest of *Amici Curiae*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF), is a non-profit corporation formed to assist African Americans in securing their rights by the prosecution of lawsuits. Its purposes include rendering legal aid without cost to African Americans suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own. For many years, its attorneys have represented parties and it has participated as *amicus curiae* in this Court, in the lower federal courts, and in state courts.[2]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution. It has two regional affiliates in Missouri: the ACLU of Kansas & Western Missouri, and the ACLU of Eastern Missouri. The ACLU has long supported abolition of the death penalty as

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[1]Letters of consent by the parties to the filing of this brief have been lodged with the Clerk of this Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made any monetary contribution to the preparation or submission of this brief.

[2]The LDF has a long-standing concern with the influence of racial discrimination on the criminal justice system in general, and on the death penalty in particular. We therefore represented the defendants in, *inter alia, Furman v. Georgia*, 408 U.S. 238 (1972), *McCleskey v. Kemp*, 481 U.S. 279 (1987), *Swain v. Alabama*, 380 U.S. 202 (1965), *Alexander v. Louisiana*, 405 U.S. 625 (1972) and *Ham v. South Carolina*, 409 U.S. 524 (1973) and appeared as *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986) and *Miller-El v. Cockrell*, 537 U.S. 322 (2003).

a form of cruel and unusual punishment. It has also long believed that the death penalty is administered in this country in a manner that is both arbitrary and discriminatory. These concerns prompted the creation of the ACLU's Capital Punishment Project, and this case once again brings those concerns into sharp focus. The question of whether juveniles can be executed by the state is thus one of substantial importance to the ACLU and its members.

The National Association of Criminal Defense Lawyers (NACDL) is a non-profit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is promotion of the proper administration of justice.

The National Bar Association, the Nation's oldest and largest bar association of color, was founded in 1925. One of its missions is to promote social justice and equality. Its membership is comprised of a network of 18,000 lawyers, judges and legal scholars who have developed a substantive interest and expertise in the juvenile justice area.

The National Urban League Institute for Opportunity and Equality is dedicated to the pursuit of equal opportunity for

African Americans and concentrates on criminal justice, employment and workforce development, education, housing and economic and community development.

The National Black Police Association (NBPA), which represents approximately 35,000 individual members and more than 140 chapters, is a nationwise organization of African American Police Associations dedicated to the promotion of justice, fairness and effectiveness of law enforcement.

The National Conference of Black Lawyers (NCBL), a legal organizations that employs its members' skills in the movement against racism and for the liberation of African peoples, seeks to protect human rights, achieve self-determination of African communities, and work in coalition to assist to assist in ending the oppression of all peoples.

The National Black Law Students Association (NBLSA), which represents over 6,000 Black students at law schools across the country, endeavors to sensitize the law and legal profession to the ever-increasing needs of the Black community.

All *amici* have a substantive interest in juvenile justice and oppose the execution of juvenile offenders because the sentencing and execution of young offenders is plagued by the same racial bias that each group strives to eliminate. *Amici* believe their perspectives on how race inappropriately influences capital prosecutions against juvenile offenders differs from the immediate concerns of the parties and will be valuable to the Court in appraising the issues presented.

Summary of Argument

This Court has long sought to ensure that the death penalty is administered with channeled discretion, that decisionmakers consider and give effect to relevant factors counseling against death, and that arbitrary factors, such as race, do not dictate the outcome of life or death decisions. By steadfastly guarding these principles, this Court has endeavored to achieve a fair and color-blind death penalty.

Despite this Court's efforts to excise race from the capital punishment calculation, it remains a pivotal factor in the administration of the juvenile death penalty. Decisionmakers — e.g., prosecutors and juries — are legally precluded from relying explicitly on race when exercising their discretion and deciding whether, and to what extent, a defendant's youth weighs against a decision to seek or to impose a death sentence. But in practice, race remains a critical consideration. Specifically, empirical evidence suggests that for offenders of color, decisionmakers discount or altogether eliminate the mitigating value of youth. Thus, currently death-sentenced juveniles as well as juveniles who have been executed are predominantly youth of color.

Empirical evidence likewise demonstrates that young offenders of color are more likely than juvenile defendants generally to be wrongfully convicted, wrongly sentenced to death, and wrongfully subjected to an otherwise flawed adjudication. Much more than a majority of both exonerated juveniles and of exonerated juvenile offenders who had been prosecuted on the basis of false confessions are adolescents of color.

Because race continues to constrain the discretionary consideration of youth as a mitigating factor and increases the risk that juvenile offenders of color will receive a death

sentence, this Court should categorically exclude juveniles from death penalty eligibility.

ARGUMENT

Introduction

The question presented by this case is whether the death penalty is constitutionally disproportionate for juvenile offenders. For the reasons outlined in Respondent's brief and the briefs of numerous other supporting *amici*, the answer to that question is certainly "yes." This brief is being submitted to highlight the fact that race improperly continues to diminish (and often to eliminate) the mitigating value of youth at the various points of discretion in capital prosecutions against juvenile offenders and thereby "undermine[s] the strength of the procedural protections that our capital jurisprudence steadfastly guards." *Atkins v. Virginia*, 536 U.S. 304, 317 (2002).

The process for determining how, if at all, to factor youth into the calculus when deciding whether to charge, prosecute, try and sentence juvenile offenders to death is unavoidably subjective and standardless. Even bifurcated sentencing hearings fail to provide meaningful direction because the sentencer is not provided with any guidelines for determining whether and to what extent a defendant's youth is to be considered a mitigating factor. This absence of structure denies capitally charged juvenile offenders the necessary protection against the influence of improper considerations, such as race, in these critical death penalty decisions. In light of this dilemma, this Court should hold that the death penalty for juvenile offenders is

unconstitutional and disproportionate, and that it violates the Eighth Amendment.

Race in the Criminal and Juvenile Justice Systems

Empirical evidence has repeatedly demonstrated that within the criminal justice system,

> [d]isproportionate burdens on people of color emerge at each point that discretion is used: whether it be the decision to detain a suspect, to make a traffic stop, to search a driver, to shoot at a civilian, to handcuff a suspect, to make an arrest, to prosecute a case, to try a minor defendant as an adult, to increase charges, to plea bargain, to convict, to determine sentence length, or ultimately whether to apply the death penalty or not. Each step in the criminal process increases the discriminatory effect, as well as the perceived image of minorities as disproportionately criminal.

Bela August Walker, Note, *The Color of Crime: The Case Against Race-Based Suspect Descriptions*, 103 Colum. L. Rev. 662, 680-81 (2003) (footnotes omitted).[3]

[3]Among the works cited by the author, see, *inter alia*, *New York City Police Department Citywide Stop and Frisk Data: 1998, 1999, and 2000*, at 1, *available at* http://www.nyc.gov/html/nypd/pdf/pap/stopandfrisk_0501.pdf (citing NYPD records indicating that approximately one half of stop and frisk suspects during 1998-2000 period were black); David A. Sklansky, *Traffic Stops, Minority Motorists and the Future of the Fourth Amendment*, 1997 Sup. Ct. Rev. 271, 313 (1997) (citing data from Florida, New Jersey, and Maryland to show that "minority motorists are pulled over far more frequently than whites"); Bureau of Justice Statistics, U.S. Dep't of Justice, *Contacts Between Police and the Public: Findings from the 1999 National Survey* 2 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cpp99/pdf ("During the traffic stop, police were more likely to carry out some type of search . . . on a black (11.0%) or Hispanic (11.3%) than a white (5.4%)."); *id.* at 16 ("Blacks (6.4%) and Hispanics (5.0%) were more likely than whites (2.5%) to be handcuffed."); Note, *Developments in the Law: Race and the Criminal Process*, 101 Harv. L. Rev. 1472, 1495 (1988) ("[A] black citizen today is far more likely than is a nonblack citizen to be shot or seriously injured by a police officer."); *City of Los Angeles v. Lyons*, 461 U.S. 95, 116 n.3 (1983) (Marshall, J., dissenting) ("[I]n a city where Negro males constitute 9% of the population, they have accounted for 75% of the deaths resulting from the use of chokeholds."); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race and Disorder in New York City*, 28 Fordham Urb. L. J. 457, 491 (2000) ("[S]top-to-arrest ratio of blacks (7.3 stops per arrest) is 58.7% higher than the ratio for non-Hispanic whites (4.6)."); Marc Mauer, *Race to Incarcerate* 125 (1999) ("[S]tatistical analysis by the United States Sentencing Commission concluded that, for comparable behavior, whites were being offered plea bargains leading to outcomes falling below the level requiring a mandatory minimum sentence more often than blacks or Hispanics.").

The same phenomenon occurs within the juvenile justice system. In juvenile justice, "discretionary decisionmaking, which necessarily utilizes substantive factors [such as the juvenile's personal and social environment, and his/her situation at home, in the community and in school], serves to facilitate disproportionately adverse outcomes for minorities, particularly African Americans." Alan J. Tompkins et al., *Subtle Discrimination in Juvenile Justice Decisionmaking: Social Scientific Perspectives and Explanations*, 29 Creighton L. Rev. 1619, 1631 (1996). Thus, the U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention has found that "[b]lack juveniles are overrepresented at all stages of the juvenile justice system

compared with their proportion to the population."[4] Specifically, African-American children are disproportionately represented in the number of juvenile arrests,[5] are overrepresented among children who are detained,[6] are more likely to have formal delinquency petitions filed against them than their white counterparts,[7] are more likely to have their cases transferred into adult court for prosecution,[8] are "more likely to be placed in public secure

[4]Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, *Juveniles in Corrections* 12 (June 2004), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/202885.pdf [hereinafter *Juveniles in Corrections*].

[5]Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DePaul L. Rev. 679, 683-84 (2002) (noting that, in 1997, while black youth accounted for only 15% of the under-eighteen population in the United States, they represented 26% of the juvenile arrests and 31% of the delinquency cases referred for prosecution).

[6]Office of Juvenile Justice and Delinquency Prevention, Office of Justice Programs, U.S. Dep't of Justice, *Minorities in the Juvenile Justice System* 2 (Dec. 1999), *available at* http://www.ncjrs.org/pdffiles1/ojjdp/179007.pdf [hereinafter *Minorities*] ("In 1996-97, while 26% of juveniles arrested were black, [blacks] made up 45% of cases involving detention. Thirty-two percent of adjudicated cases involved black youth, yet 40% of juveniles in residential placement are black. Even recognizing the overrepresentation of black juveniles involved in violent crimes reported by victims (39%), they still accounted for a disproportionate share of juvenile arrests for violent crimes (44%) and confinement (45%).").

[7]Nunn, *supra*, at 685.

[8]*Id.* at 685-86.

facilities, while white youth are more likely to be housed in private facilities or diverted from the juvenile justice system,"[9] are "more likely . . . to be confined behind locked doors,"[10] and "are . . . held in custody longer than white youth."[11]

Race Influences Capital Sentencing Decisions in Cases Involving Juveniles

The above evidence of racial discrimination within the juvenile and criminal justice systems has significant implications for this Court's — and our Nation's — aspiration to achieve unbiased capital sentencing, including in juvenile cases. Decisions whether to charge a juvenile with a capital offense, whether to offer a juvenile a non-death plea bargain, and whether to impose a death sentence on a juvenile offender, take place within the context of a system in which race is deeply ingrained. Because there are no standards governing whether and to what extent youth should factor into these decisions, there is a significant possibility, if not probability, that an offender's race will influence, if not dictate, that determination. This is so even though at every stage at which a decisionmaker must

[9]*Minorities*, *supra*, at 3. *See also Juveniles in Corrections*, *supra*, at 10 (finding that, in 1999, "[m]inorities accounted for 66% of juveniles committed to public facilities nationwide – a proportion nearly twice their proportion of the juvenile population").

[10] *Id.* at 17. *See also Minorities*, *supra*, at 9 ("Secure detention was nearly twice as likely in 1996 for cases involving black youth as for cases involving whites, even after controlling for offense.").

[11]Nunn, *supra*, at 687.

exercise his/her discretion for or against a death sentence (*e.g.*, the point at which a prosecutor files a capital charge and/or when the trial factfinder makes its sentencing determination), the decisionmaker is prohibited from explicitly considering race. The empirical evidence demonstrates that race continues to matter, presumably because decisionmaker(s) in the capital system often fail to exclude conscious or unconscious racial considerations from the subjective, standardless, and unreviewed process of deciding whether an individual defendant's youth is sufficiently mitigating to warrant leniency.

Available data regarding the administration of the death penalty for juvenile offenders supports this conclusion. As of June 30, 2004, there were 72 juveniles under sentence of death in the United States.[12] *Two thirds* are teenagers of color.[13] (In addition, *two thirds* of the victims of the death-sentenced adolescents are white.[14]) *Over half* of the juveniles who were executed since 1973 were black or Latino.[15] And significantly more adolescents of color have

[12]Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 - June 30, 2004*, at 12 tbl.5, *at* http://www.law.onu.edu/faculty/streib/documents/JuvDeathJune302004NewTables.pdf.

[13]*See id.* Twenty-nine of these offenders are African-American, 15 of them are Latino, 1 is Native American and 2 are Asian. *Id.*

[14]*See id.* One Native American, 7 Asians, 8 Blacks, 11 Latinos and 65 whites were the victims of these death sentenced juvenile offenders. *Id.*

[15]*See id.* at 4 tbl.1. Eleven of the twenty-two executed juveniles were African-American and one was Latino. *Id.*

been found to have been *wrongly convicted* of rape and murder than white adolescents: A study of exonerations occurring between 1989 and 2003 revealed that *ninety percent* of exonerated juveniles were African-American or Latino.[16]

> [Although] white defendants account for 34% of all murder exonerations and 27% of all rape exonerations — [they represent] only 14% of *juvenile* murder exonerations, and not a single *juvenile* rape exoneration. A majority of the teenagers arrested for these two crimes are white — 62% of all juvenile rape arrests in 2002, and 46 % of juvenile murder the relevant time period.[17]

This pattern of race limiting (or eviscerating) the mitigating value of youth at the point of prosecutor, judge and/or jury discretion, is consistent with the empirical evidence documenting the fact that race continues to influence capital prosecutions generally. Data reveals that

> [n]one of the statutes upheld by *Gregg* [*v. Georgia*, 428 U.S. 153 (1976)] and its progeny as formally sufficient to cure the *Furman* arbitrariness/discrimination problem have come close to eliminating it. To the contrary, capital sentencing decisions under the so-called "guided discretion" type of statute sustained in *Gregg* . . . have consistently been found to turn primarily on the race of the victim

[16]*See* Samuel R. Gross et al., *Exonerations in the United States 1989 Through 2003*, at 24 tbl.6 (Apr. 19, 2004), *available at* http://www.law.umich.edu/NewsAndInfo/exonerations-in-us.pdf.

[17]*Id.* at 34 (emphasis in original).

and secondarily on the race of the defendant, usually in combination.

Anthony Amsterdam et al., *Amicus Brief, Court of Appeals of the State of New York, People of the State of New York Against Darrel K. Harris*, 27 N.Y.U. Rev. L. & Soc. Change 399, 442-43 (2002) (footnotes omitted).[18] Thus, for example, in 1990, the United States General Accounting Office issued a Report to the Senate and House Committees on the Judiciary evaluating 28 separate studies of the death penalty from various regions of the country.[19] That report concluded that the studies "s.ıow[] a pattern of evidence indicating racial disparities in the charging, sentencing, and imposition

[18]"Looking at the 493 people who had been on death rows in 28 States just before *Furman* was decided and then at the 407 people sent to death rows in the same 28 States during their first three years of operating under post-*Furman* statutes, this study found that the percentage of nonwhite death row inmates had actually risen, from 53% to 62%. . . . Although more than half of the nation's murder victims in the post-*Furman* period were nonwhite, 87% of the victims of the persons condemned to die in States selected to compare mandatory-death-sentence jurisdictions with guided-discretion jurisdictions were white." Amsterdam, *supra*, at 442 n.143 (citing Marc Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 Temp. L.Q. 261 (1976)); *see also id.* at 443 n.147 (citing articles establishing the fact that race influences the exercise of prosecutorial discr.tion to seek a death sentence or to refuse a noncapital disposition).

[19]United States General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* 2 (Feb. 1990).

of the death penalty after the *Furman* decision."[20]

Review of one juvenile capital case provides a concrete illustration of how discretionary decisions that may be influenced by race can have a detrimental impact on the capital punishment process in cases involving young defendants.

Ryan Matthews is an African-American young man. In 1999, Ryan Matthews was charged with, convicted of, and sentenced to death for a Louisiana murder he allegedly committed when he was seventeen years old. Ryan Matthews, like the majority of death-sentenced juveniles, was convicted of murdering a white victim. A jury composed of 11 whites and one black found him guilty notwithstanding questionable identification testimony,[21] the absence of physical evidence connecting Ryan Matthews to

[20]*Id.* at 5. The GAO Report concluded that "[i]n 82 percent of the studies, race of victim was found to influence the likelihood of being charged with capital murder or receiving the death penalty, i.e., those who murdered whites were found to be more likely to be sentenced to death than those who murdered blacks." Furthermore, the GAO study found that "[t]he evidence for the race of victim influence was stronger for the earlier stages of the judicial process (e.g., prosecutorial discretion to charge a defendant with a capital offense, decision to proceed to trial rather than plea bargain) than in later stages." *Id.*

[21]Rick Bragg, *DNA Clears Louisiana Man on Death Row, Lawyer Says*, N.Y. Times, Apr. 22, 2003, at A14 ("One witness said he had pulled his car in front of the robber's car and fishtailed for a while so it could not get past him. The witness said that as he was dodging bullets from the gunman, he saw the gunman's face clearly in the rearview mirror. Another witness said she had seen Mr. Matthews briefly pull up the mask in the store while she was in the parking lot.").

the murder, and the inconsistencies between the witness statements and the physical evidence.[22] The same jury sentenced Ryan Matthews to death.

In 2003, after another prisoner bragged of having committed the murder for which Ryan Matthews was convicted, DNA testing was conducted. Those tests revealed that DNA found in saliva and a skin cell which were left on the ski mask worn by the killer did not match the DNA of Ryan Matthews. Instead, it matched the DNA of the bragging prisoner — a convicted drug dealer and murderer. Ryan Matthews' conviction was then vacated and a new trial was ordered. He was released from prison on bond and is now awaiting re-trial.[23]

Given the dearth of credible evidence regarding guilt, it would have been reasonable to expect that Ryan Matthews' youth would, at the very least, have diminished the likelihood that a death sentence would be sought or imposed.

[22]"Witnesses said the masked gunman had dived through the open car window, but the window on the Grand Prix the police believe was the getaway car [the car in which Mr. Matthews was apprehended] had been stuck closed for as long as anyone could remember." *Id.* Additionally,

> [e]yewitnesses had said the gunman in the convenience store was not very tall, perhaps 5-5 or 5-6, and of medium build. Sheree Falgout, who was standing at the register when the proprietor was gunned down, recalled telling the police that the assailant 'was not a large person.' Other witnesses concurred. Ryan Matthews is 6 feet tall.

Bob Herbert, *Trapped in the System*, N.Y. Times, July 14, 2003, at A17.

[23]*See* Gwen Filosa, *Ex-Death Row Inmate Home on Bond,* Times-Picayune, June 23, 2004.

It did not. And, although"[w]e cannot say from facts disclosed in [the] record[] that [this] defendant[] [was] sentenced to death because [he was] black,"*Furman v. Georgia*, 408 U.S. 238, 253 (1972) (Douglas, concurring), it is equally impossible to discount the possibility that race played a constitutionally inappropriate role in the ultimate decision to seek and impose the death penalty. In light of all of the other factors counseling against the execution of juvenile offenders, such individuals should not, in addition, be compelled to face the risk of racial bias in the capital punishment process.

The Only Way to Insure that Race Does Not Determine Whether a Juvenile Defendant Will Receive a Death Sentence Is to Hold that the Death Penalty May No Longer Be Imposed Upon Juveniles

In 1972, this Court announced, in *Furman v. Georgia*, 408 U.S. 238 (1972), that any law which allowed an arbitrary and illegitimate factor such as race to play a role in the administration of the death penalty is unconstitutional. *See id.* at 249-57 (Douglas, J., concurring), 274-77, 293-96 & n.48 (Brennan, J., concurring), 309-10 & n.13 (Stewart, J., concurring), 312-14 (White, J., concurring), 363-66 & n.152 (Marshall, J., concurring). While the death penalty laws have been changed to limit sentencer discretion, *see Gregg v. Georgia*, 428 U.S. 153 (1976), race continues to play an invidious role in the administration of capital punishment for juvenile offenders. The death penalty for such offenders is, therefore, unconstitutional.

The Eighth Amendment's prohibition on excessive sentences requires the "punishment for crime [to] be graduated and proportioned to [the] offense." *Weems v.*

United States, 217 U.S. 349, 367 (1910). In analyzing whether capital punishment is constitutionally proportional for specific categories of offenders, this Court has considered whether the offenders at issue have a characteristic which undermines the criminal justice system's capacity for effective adjudication. Thus, for example, when this Court decided that the Eighth Amendment prohibits the execution of mentally retarded offenders, it held that

> [t]he risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty,"is enhanced, not only by the possibility of false confessions, but also by the lesser ability of mentally retarded defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. As *Penry* demonstrated, moreover, reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.

Atkins, 536 U.S. at 320-21 (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978)) (footnote omitted).

Youth of color in capital cases face meaningfully identical circumstances. For many juvenile offenders, race devalues evidence that would otherwise support a case for life, encourages the imposition of the death penalty *in spite of* the existence of factor(s) which should call for leniency and ultimately functions as an unlawful impediment to the

proper consideration of mitigating evidence. "When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Lockett*, 438 U.S. at 605.

One specific way in which race increases the likelihood that the death penalty will be imposed on a juvenile offender notwithstanding the existence of significant factors calling for leniency is that youth of color, like offenders with mental retardation, are more likely to offer false confessions. As detailed in other briefs before this Court, this is true for juveniles in general. Empirical evidence reveals, however, that this likelihood of falsely confessing is even greater when the youth at issue is a person of color. The Gross study of rape and murder exonerations between 1989 and 2003, revealed that "*[e]ighty-five percent* of the juvenile exonerees who falsely confessed were African American."[24] Thus, race combines with age to render capitally charged juveniles particularly vulnerable to false confessions and wrongful convictions. The combination thereby enhances "[t]he risk 'that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Atkins*, 536 U.S.at 320-21 (quoting *Lockett*, 438 U.S. at 605).

Additionally, as with mental retardation, the combination of race and youth functions as a "double-edged sword," increasing the likelihood that a sentencer will perceive the defendant as a future danger. When the offender is a young person of color, the jury may be conditioned to think of the offender as "the other" and dangerous (especially if the victim is white).[25] The youthfulness of the offender causes

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[24]Gross, *supra*, at 25 (emphasis added).

[25]*See, e.g.*, David C. Baldus et al., *How the Death Penalty Works: Empirical Studies of the Modern Capital Sentencing*

the jury to think that this defendant is more likely to get out of prison and is, therefore, more likely to pose a future danger to society.[26] Combined these factors undoubtedly cause the jury to lean in favor of the death penalty. Race together with youth is, therefore, a combination which is often perceived by factfinders as aggravating when, in fact, it can and should be perceived as mitigating.

Because youth combines with race in a way that "undermine[s] the strength of the procedural protections that our capital jurisprudence steadfastly guards," *Atkins*, 536 U.S. at 317, and because, as a result, youth of color "in the aggregate face a special risk of wrongful execution," *id.* at 321, it is appropriate for this Court to issue "a categorical rule making such offenders ineligible for the death penalty." *Id.* at 320.

System, 83 Cornell L. Rev. 1638 (1998) (finding that in Philadelphia, Pennsylvania, African-American capital defendants faced substantially increased odds of receiving the death penalty as compared to similarly situated white defendants and that being African American increased the odds of receiving a death sentence to the same extent as did the presence of the additional aggravating circumstances of torture or grave risk of death).

[26]Indeed, in Christopher Simmons' case, the prosecution argued that the jury should consider Mr. Simmons' age as an aggravator instead of a mitigator in that it rendered him more likely to be a future danger to society. *State ex rel. Simmons v. Roper*, 112 S.W.3d 397, 413 (Mo. 2003)

Conclusion

The judgment below should be affirmed.

Respectfully submitted,

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